No. 15966

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER AND RESPONDENT,

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC., THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, RESPONDENTS AND PETITIONERS.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
and
CROSS-PETITION FOR REVIEW OF SAID ORDER

BRIEF OF RESPONDENTS ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER

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I.

JURISDICTION

This matter is before the court, both upon the Board's petition for enforcement and the petition of the various respondents for a review of the Board's order. The jurisdiction of this court to review the order of the National Labor Relations Board is founded upon paragraph f. of section 160, Title 29, United States Code.

II.

ADDITIONAL STATEMENT OF THE CASE

These respondents, acting on behalf of their members in 1955 negotiated a contract on an industry-wide basis with the Western Washington District Council and local unions having jurisdiction in that territory of the International Hodcarriers, Building and Common Laborers of America acting on behalf of their members (Gen. Cou. Ex. 4). Subsequent to the negotiation of this contract, these respondents have had nothing to do with the hire, discharge or employment of men under the contract (R.90, R.93), and the managers of the chapters actually had no direct knowledge of what their members did with respect to the hiring of men (R.114-115). The AGC chapters had consistently advised their members that in the hiring of employees, they were not to discriminate with respect to whether a man was a member or non-member of a union (R. 81, 86, 88) and both chapters had issued bulletins to their members implementing this advice (Gen. Cou. Ex. 5 and Tacoma Chapter AGC, Ex. 1). None of the AGC chapters had ever advised their members that the contract obligated them to obtain their laborers exclusively from the union hiring hall (R-82, R-88-89). In fact, it was a matter of frequent occurrence for the members of the three AGC chapters to hire men directly without going through the union hiring hall (R-83, R-87, R-93, R-107). When inquiry has been made to the managers of the chapters as to whether an employer had to get union clearance before hiring a man, the employers have been consistently advised that they did not (R-86-87, R-93, R. 107-108).

The charging party, Cyrus Lewis, never made application for employment to any of the members of the AGC chapters (R. 78) and none of the members of the AGC chapters had refused to hire Cyrus Lewis (R. 84, R. 100, R. 91). There is no evidence that any complaint was ever made to the AGC chapters about any discrimination against Lewis nor was any such complaint made to any of the members of the chapters. Cyrus Lewis is a complete stranger to these respondents. The managers of the chapters had taken the view, and had so advised their members, that there was no obligation under the contract to clear through the union before hiring men off the street without the use of the union hiring hall. Thus, the manager of the Seattle Chapter testified (R. 87):

> "Answer—No, he asked me if he could do it without clearing the man through the union. I said: 'Under the law you can do it without clearing the man through the union.'" The manager of the Mountain Pacific Chapter testified (R. 107: "Answer—I will bet our members have hired 200 people this summer. I know of 50 students that were hired directly from the university, but for unskilled work. Question—Was this the subject matter of complaints that the union made to you? Answer—No, not at all."
>
> He went on to testify (R. 107): "Question—This group of people you speak about, did the union with respect to that group of people agree that they might be hired? Answer—It was just a courtesy to let them know what we were doing. Question—Did you get an agreement from them with respect to hiring or referral from the union? Answer—No. Question—Was there not an understanding reached between you and the union that no referral would be required with respect to these university students? Answer—Not with us there wasn't."

The jurisdiction of the Board was sought to be established solely by a showing that some members of the AGC chapters were engaged in commerce (SR. 212). There was no evidence or finding that any member engaged in commerce ever had any contact whatsoever with the charging party, Cyrus Lewis, or that Cyrus Lewis would have been referred to an employer engaged in commerce if the union had dispatched him. There was no evidence offered or admitted to the effect that members of the AGC chapters affected by the contract had any job openings that the charging party, Cyrus Lewis, failed to get by reason of the contract or even that the members of the AGC chapters were making any use of the hiring hall at the time of the application of Cyrus Lewis. This latter fact is expressly found by the trial examiner (R. 33) and that finding of fact is not set aside in the opinion of the Board. Counsel for the government conceded at the trial that no proof had been made that Lewis was kept from getting a job with any specific employer (SR. 224).

(a) *The Questions Involved in this Case are as follows*:

1. Can an association carrying on industry-wide bargaining on behalf of its members be held liable for an illegal application of the contract where neither it nor its members knew of or participated in the illegal application?

This question is raised in this case by the order of the Board finding these respondents liable for the union's failure to dispatch Cyrus Lewis for employment although no evidence was introduced to indicate any participation or knowledge of these facts by these respondents.

2. Can liability to a charging party be established without proof that the contract prevented him from obtaining any particular employment?

This question arises because of the Board order directing the payment of reparations by the AGC chapters, notwithstanding there was no testimony or proof that the charging party, Cyrus Lewis, was prevented from getting any available job with any members of the AGC chapters by reason of this contract.

3. Can jurisdiction of the National Labor Relations Board be established merely by showing that an association of employers has members engaged in commerce without any further showing that the members engaged in commerce were affected by the alleged unfair labor practice?

This question arises because jurisdiction of the National Labor Relations Board was sought to be established by the government solely upon the basis of proving that the Associated General Contractors chapters had members carrying on extensive commerce but no proof was adduced to show that the alleged unfair labor practice prevented the charging party from obtaining employment with any member engaged in commerce or that any member engaged in commerce was in any manner connected with the case of Cyrus Lewis.

4. Can an association of employers which negotiated a contract more than six months prior to the filing of the charge be held liable for maintaining, in effect, an illegal clause in the contract where they had consistently advised their members to interpret it in a legal manner?

This question arises because the Board found the AGC chapters liable solely because they had maintained the contract in effect whereas the undisputed testimony shows that they had nothing to do with the actual carrying out of the contract with respect to employment, but had consistently advised their members that the contract was to be interpreted as non-exclusive and non-discriminatory.

III.

SPECIFICATIONS OF ERRORS

The National Labor Relations Board erred in the following respects:

1. In holding that the AGC chapters are subject to the jurisdiction of the NLRB as an employer engaged in interstate commerce within the meaning of the National Labor Relations Act.

2. In finding that these respondents engaged in any unfair labor practice.

3. In not dismissing the action as to these respondents.

4. In making findings and conclusions not supported by the evidence.

IV.

ARGUMENT

In this case the court has before it a petition for enforcement filed by the National Labor Relations Board and also a petition to review filed on behalf of these respondents. The issues raised in the two petitions are identical and consequently we shall discuss these issues together.

(a) The Contract is not Per Se Illegal.

There is no evidence and no finding that the chapters of the Associated General Contractors partici-

pated in any way in the alleged mistreatment of Cyrus Lewis. The footnote to the order of the National Labor Relations Board (R. 46) states in part:

> "... our finding against the other respondents is limited to the maintenance of the hiring provisions of the contract rather than their execution."

The Board's decision insofar as it holds these resondents liable is based upon a determination that the contract itself, irrespective of how it is applied, is illegal and constitutes an unfair labor practice. The Board said in its opinion (SR 197):

> "We hold the hiring hall provisions of this contract to be unlawful. For the purpose of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegations and discriminatory practices in hiring."

In arriving at this conclusion, the Board set aside the recommended order of the trial examiner and reversed his findings and we submit disregarded the language of the contract itself. In its opinion the Board stated what is not true (S.R. 196):

> "The respondents do not, nor could they argue that this contract does not make employment conditional upon union approval, for a more complete and outright surrender of the normal management hiring prerogative to a union could hardly be phrased in contract language."

The foregoing language is neither supported by what the contract says nor by the evidence and certainly these respondents do argue that the contract does not make employment conditional upon union approval.

Section 6 of this contract contains no language providing that union members shall have any preference in employment. In this respect it is different from the contract that was before the court in the case of *NLRB vs. E. F. Shuck Construction Co., Inc., et al,* 243 F. (2d) 519. The contract in that case provided:

> "It is further agreed that all members of the party of the first part hiring employees will employ none other than members of the party of the second part. . ."

The contract in the Shuck case was the predecessor of the contract involved here and the provision for preferential hiring of union employees was pointedly omitted from the present contract.

Section 6 of the present contract does not bind the employer to *exclusive* use of the union hiring facilities. A critical inspection of the language of section 6 of the contract (Gen. Cou. Ex. 4) will show that in its paragraph (a) it places upon the union an obligation and a responsibility to recruit employees and maintain offices for the convenience of the employer and the need of employees. The language does not say that the employer may not hire its men elsewhere.

Paragraph (b) says that the employer will call upon the union for men but does not say that he may not obtain other men elsewhere.

Paragraph (c) is applicable only after the employer *has placed orders with the union* and in that case if the union cannot fill the order, the employer is relieved from any obligation to the union and may employ its men elsewhere. This is similar to a provision that might be in an arrangement with a private employment agency to provide that there would be no breach of contract if after order was

placed the agency, having been unable to fill it, the employer then sought its men elsewhere. This language does not bind the employer to wait 48 hours unless it has *actually placed orders* for men with the union.

Paragraph (d) of section 6 expressly recognizes the fact that the agreement has been made in recognition of the existing statutory restrictions on exclusive hiring through the union and provides for renegotiation of the contract in case the laws are changed. For convenience, we set out again the provisions of section 6 of the contract.

> "6. To maintain employment, to preserve workable labor relations, to proceed with private and public work, the following accepted prevailing practices shall continue to prevail in the hiring of workmen:
>
> "(a) The recruitment of employees shall be the responsibility of the union and it shall maintain offices or other designated facilities for the convenience of the Employers when in need of employees and for workmen when in search of employment.
>
> "(b) The Employers will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.
>
> "(c) Should a shortage of workmen exist and the Employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours, Saturdays, Sundays and holidays excluded, the Employer may procure workmen from other sources.
>
> "(d) Either party to this Agreement shall have the right to reopen negotiations pertaining to Union security by giving the other party thirty (30) days written notice, when there is reason to believe that the laws pertaining there-

to have been changed by Congressional Amendments, Court Decisions, or governmental regulations."

The language used in this section neither by its terms nor by the construction placed upon it by the parties who made it bars an employer from hiring men from any source the employer chooses to resort to. We make this statement in the light of the following considerations:

1. It was testified to without contradiction that the AGC chapters did not consider their members bound to the exclusive use of the union hiring facilities and their members did, in fact, when they saw fit hire men off the street without using those facilities. Thus (R. 107):

> "Question—As a matter of fact do not your employer members seek to get whatever work force they need through the hiring hall? They don't hire off the banks and practice, do they?
>
> Answer—I will bet our members have hired 200 people this summer. I know of 50 students that were hired directly from the university but for unskilled work."

That was the testimony of the manager of the Mountain Pacific Chapter. The manager of the Seattle Chapter said: (R. 87):

> "Answer:—What I said was that he called me and asked me if he could employ a student as a common labor on his job for a period of two weeks during spring vacation. Question—You told him he could? Answer—Yes, I told him he could. Question—That was the extent of the advice you gave him? Answer—No, he asked me if he could do it without clearing the man through the union. I said under the law you can do it without clearing the man through the union."

The manager of the Tacoma Chapter testified (R. 88):

> "Question—Do all of your members obtain all of their laborers in accordance with section 6 of this agreement by recruiting their people through the union? Answer—No. Question—to what extent do they not? Answer—Since my short time in Tacoma I believe that there was only once that some union representative objected about a particular contractor because he was hiring men off the street. That is the term that was used and that is the only case I recall. Question—Do you undertake to enforce or advise—did you undertake to advise your members that they must comply? Answer—No, I didn't."

2. In actual practice the language was not interpreted by the AGC chapters as binding their members to exclusive use of the union for obtaining workmen.

We make the statement that the contract did not bind the AGC chapters or their members to an exclusive arrangement for the further reason that if the language was susceptible to that interpretation, it was, if the decision of the board in this case is correct, illegal and to that extent was unenforceable and void. The chapters always took the view that there was no enforceable obligation for them to hire exclusively through the union.

It is fundamental law that an illegal contract is not a binding obligation on the parties, 12 Am. Jur. 641, *William Lindke Land Co. vs Kalman* (Minn. 252 N.W. 650, 93 A.L.R. 1393); U. S. vs. *Trans-Missouri Freight Association,* 166 U. S. 290, 41 Law. Ed. 1007; Am. Jur. states the rule:

> "It is a general rule that an agreement which violates a provision of a constitution or of a

constitutional statute or which cannot be performed without violation of such a provision is illegal and void."

12 Am. Jur., Contracts, 652. See also *Ewert vs. Blue-Jacket,* 259 U.S. 129, 66 Law Ed. 858. *Connolly vs. Union Sewer Pipe Co.,* 184 U.S. 540, 46 Law Ed. 679; *Burck vs. Taylor,* 152 U.S. 634, 38 Law Ed. 578.

The parties to this case knew that section 6 of the contract could not be enforced as an obligation to use the union hiring facilities exclusively and the Tacoma Chapter so informed its members. In a bulletin dated June 26, 1956, (Tacoma AGC Ex. 1) wherein they stated:

> "The NLRB's recommended order to the union and the AGC chapters states that 'we will not maintain, give effect to, renew or enforce any union security provisions in any agreement with the International Hodcarriers and Common Laborers Union of America. . . which requires job applicants to be cleared or approved by any labor organization except as authorized by section 8 (a) (3) of the act (Taft-Hartley). Among others paragraph 6, section B of our contract which states that the employers will call upon the local union for their workmen, in particular, has been ruled illegal and members should be very cautious in their hiring of men to be sure that the law is not being violated."

The known, unenforceable character of an exclusive hiring provision was taken into consideration by the manager of the Seattle Chapter in advising his members that they did not have to go through the union in doing their hiring (R. 83), and by the manager of the Mountain Pacific Chapter when he stated (R. 107):

> ". . .then we call on them because they have the men, not because we have to go through

them, but because they are the only source of information that we have available."

Thus, paragraph 6 of the contract did not bind the employers to exclusive resort to the union as a source of its men either by the terms of the language used, the interpretation put upon it by the parties to it, or by its legal implication. Legally that section would have been absolutely unenforceable if any attempt had been made to require the employers to resort solely to the union for their men since the section as so interpreted was illegal under the Taft-Hartley Act if the decision of the National Labor Relations Board in this case is correct.

There is nothing in the National Labor Relations Act which prohibits an employer from hiring a union man, or a non-union for that matter, and there is nothing in the Act which prohibits the employer from asking the union to refer to him a man. There is nothing in this contract that excludes the employer from rejecting the man sent by the union if the employer does not consider him desirable, and so long as the employer has the right to use or not use the union dispatching facilities, there has been no abdication of any of the functions of the employer in hiring. That is the case here.

Section 6 of the agreement merely recognizes what every one knows, namely, that the union is a ready source of qualified men and the employer can save the trouble of searching for such men by calling on the union when he needs men. The provision in a contract that the union shall maintain a hiring hall and shall make it available for the convenience of the employer violates no portion of the National Labor Relations Act. There is nothing per se illegal in this contract. The contract could become illegal only if a situation existed which was

not established in this case, namely, that the employer had surrendered his right to select the persons who would be employed by him. The use of the union hiring facilities has been sustained by the courts many times. *Eichleay Corp. vs. NLRB,* 206 F. (2d) 799. *Del E. Webb Construction Co. vs. NLRB,* 196 F. (2d) 841. *NLRB vs. Swinerton,* 202 F. (2d) 511.

This contract, neither by its language nor by the construction which these parties gave it, ever ousted the employer of the right to do his own hiring and hence there was nothing illegal in it.

(b) The Board's Decision With Respect to the AGC Chapters is Based Upon Speculation and Assumption Contrary to the Evidence.

The legal principle of burden of the proof is applicable to proceedings before the National Labor Relations Board as well as to any ordinary legal proceeding. Insofar as the AGC chapters are concerned, proof of the Board's contentions was wholly lacking. The key to the Board's decision insofar as the AGC chapters are concerned will be found in the following quotation from the Board's opinion (S.R. 207):

> "As an old-time member of the Union, and aware of the established hiring hall arrangement, Lewis, of course, went to the Union to apply for work. Had he gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance, for that is precisely what the contract obligated each employer to do. It matters not, therefore, which of the two parties to the illegal contract he first approached. His unlawful exclusion from employment was a joint act by both Respondents. It is equally immaterial that there is no evi-

> dence now before us that on the particular days when he was rejected there were job openings with the Respondent employers, or current requests for referrals in the hands of the union officials pursuant to the contract."

The Board's assumption that had Lewis gone directly to one of the Respondents Employers he would have unquestionably been rejected summarily and referred to the union for clearance, is drawn out of thin air. There is no evidence that Lewis ever applied to any member of the AGC chapters (R. 79). There is absolutely no evidence upon which the assumption is based. The evidence is, however, uncontradicted that the members of the AGC did on many occasions hire persons direct and without any clearance from the union (R. 87, R. 93, R. 107).

We deem it an important factor in this case that Lewis *never made application* to any AGC member and *was never rejected* for employment. The current contract, as we have pointed out previously, had been expressly changed to eliminate any requirement that the employers hire union men exclusively. If Lewis assumed that he could not be hired by an employer to whom he applied directly, there was no basis for such assumption, either in the contract or in the practice of the parties, insofar as any evidence introduced in this case shows.

The finding by the Board that Lewis' application would have been summarily rejected must be based upon something more substantial than conjecture. *NLRB vs. Englander,* 260 F (2d) 67, 73. Without the assumption the government's whole case falls since it must depend upon the maintenance by these respondents of a contract which had the effect of discriminating against Lewis for lack of union membership. The chapters cannot be found guilty

on mere suspicion. A provision in the contract which the AGC chapters did not consider as binding them to exclusive use of the union facilities which would, under the decision of the National Labor Relations Board in this case have been void and unenforceable was in itself not sufficient to prove that its mere existence prevented Lewis from getting employment from the members of the AGC in the light of the fact that *he never tried* to obtain such employment direct from the members.

(c) There was no Proof that the Alleged Illegal Contract Provision was the Cause of a Discrimination Against Lewis.

The Board seeks to hold the AGC chapters financially liable to Lewis for his failure to obtain employment. The doctrine of proximate cause is as applicable to this case as to any other. The government wholly failed to show that Lewis would have obtained any employment from the members of the AGC chapters even if the provisions of section 6 of the contract had not been there or had been carried out in another or a non-discriminatory manner. As the examiner pointed out in his decision, there was not even any proof that any jobs were available from these respondents' members during the time that Lewis claims that he was discriminated against. In the absence of proof that he lost something, the AGC chapters cannot be held liable to reimburse him for that which it is not shown he would have had anyway.

The examiner found (R. 35):

> "There is no doubt, as pointed out earlier, that Local 242 discriminated against Lewis, but there can be no finding that it discriminatorily exercised the authority delegated to it by mem-

> bers of the AGC Chapters if there is no evidence that at any time since the effective date of the agreement, any of these members sought or requisitioned labor from Local 242, the agency through which Lewis sought job referrals. The critical fact is that there is no such evidence, and however one may condemn the treatment accorded Lewis by Local 242, and desire to do him moral justice, one must not blind himself to deficiencies in the evidence."

The examiner, who was reversed by the Board but not with respect to this finding said (R. 33):

> "The heart of the matter is that there is no evidence in the record that any member of any of the AGC Chapters sought or requisitioned any labor at or through the office of Local 242 at any time since the effective date of the contract. Moral convictions that such requisitions were made will not suffice, for they are no substitute for evidence."

No court should sustain a judgment for a substantial amount of money without some proof of the facts which create the liability. There is no showing here that Lewis failed to get any job that might have been made available had other provisions in the contract existed nor is there any showing that he could not have been hired had he made application direct to the members of the AGC. There has been a total failure of proof. The matters that we are now discussing are not mere technical objections to the proceedings in this case—they are matters of substance.

This is a situation in which the charging party is a complete stranger to the respondents and their members. It is useless to speculate as to what would have happened had he applied to the members of these respondents or complained to them about the

treatment that he got from the union. If the rules of burden of the proof mean anything and if the rules of proximate cause mean anything, the Board's case has wholly failed here.

(d) Liability of These Respondents is Barred by Limitation.

No evidence was introduced that these respondents did anything with respect to the contract after its negotiation. The basis for liability of these respondents is stated in the Decision and Order paragraph (2) (R. 45) as follows:

> ". . .we conclude that the respondent-employers have violated section 8 (a) (3) and (1) of the act. . . by executing and maintaining in effect the hiring provisions of their contract."

In the footnote to the order (R. 45) the Board says:

> "As only the charge against respondent Local 242 was filed within six months of the execution of the contract in question, our finding against the other respondents is limited to the maintenand of the hiring provisions of the contract rather than their execution."

Section 10 (b) of the National Labor Relations Act (29 USC 160) provides in part:

> "Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made. . ."

Since the liability in this case is based solely upon the maintenance of the contract in effect, we submit that it was incumbent upon the government to prove that these respondents in the six months preceding the filing of the charge undertook to so

maintain the contract in effect that it gave the exclusive control of hiring to the unions. The government did not do this, but the witnesses that they produced to attempt to establish such fact, namely, the three AGC managers, all testified not only that they had not under taken to enforce exclusive hiring through the union but that they had advised their members that it was not necessary to go through the union. (R. 88 to 91, Tacoma Chapter's Ex. 1, R. 90, R. 107).

Surely the continued disclaimer of any obligation on the part of the members to clear through the union cannot be held to constitute the keeping of the portion of the contract complained of in effect, at least insofar as the construction that the government tries to put on that portion is concerned. These AGC chapters did nothing within six months before the filing of the charge which constituted an unfair labor practice.

(e) The National Labor Relations Board Had No Jurisdiction Over These Respondents.

In order for the National Labor Relations Board to have jurisdiction there must be an unfair labor practice affecting commerce. This is the requirement of Section 10 (a) of the Act (USC Title 29, Sec. 60). The opening sentence of that section reads:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice listed in section 8 affecting commerce. . ."

There is no evidence to sustain any finding that commerce was involved here. No showing was made that the corporate entities constituting the AGC chapters themselves hired, would have hired, or would have had anything to do with the hiring of

Cyrus Lewis no matter how his applications had been handled. There is no evidence to indicate whether if Cyrus Lewis had been referred to a job, it would have been with an employer engaged in interstate commerce *or would have been employment affecting commerce.*

The evidence was clear that the AGC chapters themselves did not do any of the things which are normally criteria for being engaged in commerce. Thus, they neither hire nor pay anyone (R. 82); they do not take construction contracts (R. 82); they do not purchase materials received in commerce (R. 82). The sole basis for holding that commerce was affected here was by establishing that some members of the AGC chapters did work in commerce. On the same basis, every Chamber of Commerce, every commercial club, and every business association is subject to the National Labor Relations Act. We believe that the law is not susceptible to this type of construction. It is sought here to hold the chapters themselves, which are corporate entities separate from their members, financially liable for recompensing Lewis for the loss of work that it has not been proven ever existed, upon the basis of the involvement in commerce of some members of the AGC chapters but who were not shown to have had even a remote or potential association with Lewis. In other words, there has absolutely been no showing that Lewis was in commerce, that his employment was in commerce, or that the failure of the union to dispatch him had any effect whatsoever on commerce. Here again is a failure of proof. No case of jurisdiction has been established.

For all that appears in the record Lewis might have worked all his life in jobs not affecting com-

merce and if he had been dispatched he might not ever have been referred to any employer engaged in commerce. Certainly his failure to be dispatched had no effect upon the AGC chapters themselves since they were not employing any person in commerce and would not have employed Lewis anyway because he was not the type of person that the chapters employed. Jurisdiction of the National Labor Relations Board may not be established by mere speculation.

(f) The Order of the National Labor Relations Board is Contrary to Law.

Aside from the consideration which we have already discussed as to the justification of any finding against these respondents the order of the National Labor Relations Board is too broad. It does not merely enjoin them from maintaining in effect that portion of the contract about which complaint is made, but undertakes to go much further. Paragraph (2) of the order (R. 48) says that the AGC chapters shall cease and desist from:

> "In any like or related manner encouraging membership in the Respondent Unions, or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act."

There is nothing in the record to indicate that these respondents are about to interfere with, restrain or coerce employees in the exercise of any rights guaranteed in Section 7 of the Act, nor is there anything to indicate that these respondents in respect to any other labor organizations are about to do this. The proposed order is much too broad. The

Supreme Court of the United States and this court have both heretofore indicated that an order of enforcement should not be entered beyond the scope of the matter adjudicated. A case directly in point is *National Labor Relations Board vs. Express Publishing Co.,* 312 U.S. 426, 85 Law Ed. 930. In that case the National Labor Relations Board proposed an order beyond the scope of the matter at issue. The court in holding the order improper said:

> "The Board made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them gave any indication that in the future respondents would engage in any or all of the numerous unfair labor practices defined in the act."

The same thing may be said in this case. There is no finding by the Board that the AGC chapters are about to interfere, restrain or coerce employees from either this union or any other union in the exercise of the rights guaranteed them under Section 7 of the Act. The United States Supreme Court in the above case went on to say:

> "In view of the authority given the Board by section 10 (c), carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and the broad language of section 10 (e) authorizing the courts to modify the order of the Board wholly or in part, we can hardly suppose that Congress intended that the Board should make, or the court should enforce, orders which could not appropriately be made in judicial proceedings. This is the more so because section 10 (a) which authorizes the Board 'as hereinafter provided to prevent any person from engaging in any unfair labor practice,' specifically directs that 'this power shall be exclusive

> and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.' In the light of these provisions we think that Congress did not contemplate that the courts should by contempt proceedings try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found."

It will be noted that the Supreme Court specifically held that the decree should not include a restrainer as to *violations not found* by the Board. The court also held that the mere fact that one violation has been found does not justify an injunction just broadly stating that the respondents shall obey the statute. The court said:

> ". . .The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which the defendant has committed."

In the case just cited, the court refused to grant a broad order generally requiring the compliance with the National Labor Relations Act where there was no finding to justify any indication that other and different kinds of violations would occur. It is clear from the foregoing citation that the Supreme Court of the United States has specifically approved the authority of the courts to review and

limit enforcement decrees to keep them within the bounds of the issues and the findings. This court itself has recognized that it has a duty to see that the enforcement orders are not too broad to be sustained by the issues before the court.

In the case of *National Labor Relations Board vs. Mason Mfg. Co.,* (9CCA 1942) 126 F. (2d) 810, this court said:

> "The court believes it should exercise great care in entering general cease and desist decrees in such cases as these whereby a single mistaken act on the part of the employer would on the face of the decree transfer from the experience, skill and knowledge of the board future claims of violation of the Act affecting some entirely different labor organization in an entirely different way, and place their determination in contempt proceedings in the more restricted area of evidence of court procedure."

The only issue in this case was whether the maintenance of Section 6 of the contract constituted an unfair labor practice. There is no finding, and there is no evidence, to indicate any threat of any interference, restraint or coercion of employees, and it would be improper to include in any enforcement order, any restraint which would result in punishment as for contempt of court of these respondents in the case of any future alleged interference, restraint or coercion of employees.

Respectfully submitted,

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